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No. 90-1604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

BRIEF OF PETITIONER

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January 1992

QUESTION PRESENTED

Can airlines falsely advertise air fares in Texas, in total disregard of state law prohibitions, merely because the federal government has pre-emptive regulatory authority over an airline's "rates, routes, or services" under the Federal Aviation Act?

LIST OF PARTIES

This petition is filed by Texas Attorney General Dan Morales.[1] In addition to Texas, 33 state attorneys general are parties to this proceeding, having been defendants in the proceedings below.[2]

The plaintiffs/appellees below were Trans World Airlines, Inc.; Continental Airlines, Inc.; British Airways PLC; Air Canada; Compagnie Nationale Air France; Alitalia-Linee Aeree Italiane, S.p.A.; El Al Israel Airlines Ltd.; Finnair; Lufthansa German Airlines; Japan Air Lines Company, Ltd.; Qantas Airways Ltd.; Scandinavian Airlines System; Viacao Aerea Rio-Grandense (VARIG); and Pan American World Airways, Inc.[3]

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1 Petitioner will be referred to herein as "the State" or "Texas."

2 These are the Attorneys General of the States of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming. A petition for a writ of certiorari filed by 31 of these state attorneys general (all but the attorneys general of Arkansas and Maine) is pending before the Court. *Attorney General of California v. Trans World Airlines, Inc.*, No. 90-1606.

3 These 14 respondents will be jointly referred to as "airlines" or "respondents."

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BRIEF OF PETITIONER

OPINIONS BELOW

The January 18, 1991, opinion of the United States Court of Appeals for the Fifth Circuit is published at 924 F.2d 1055 (5th Cir. 1991) and is reprinted at App. to Cert. Pet. 1a.

This case has been the subject of a prior appeal from the district court's issuance of a preliminary injunction, which the court of appeals affirmed on April 3, 1990, in an opinion published at 897 F.2d 773 (5th Cir. 1990); App. to Cert. Pet. 13a. On October 15, 1990, the Court denied Texas' petition for writ of certiorari to review the preliminary injunction, Justice

Blackmun noting that he would dismiss the petition as moot. 111 S.Ct. 308 (1990).

On remand, the district court entered a permanent injunction and final judgment on June 1, 1990, which is reprinted at App. to Cert. Pet. 8a and which is virtually identical to the preliminary injunction that the court of appeals affirmed in its prior order. On January 18, 1991, the court of appeals affirmed the permanent injunction, based on its prior opinion with respect to the merits of the preliminary injunction. App. to Cert. Pet. at 1a. On November 27, 1991, the Court granted the petition for a writ of certiorari.

JURISDICTION

A petition for a writ of certiorari was timely filed on April 16, 1991. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Aviation Act § 105(a)(1), 49 U.S.C. § 1305(a)(1) [in pertinent part]. Federal preemption.

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Federal Aviation Act § 411(a), 49 U.S.C. § 1381(a). Methods of competition.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Federal Aviation Act § 1106, 49 U.S.C. § 1506. Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE § 17.46(a) [in pertinent part].

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division [of the Texas Attorney General] . . ..

Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE § 17.46(b) *[in pertinent part]*.

[T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

* * *

(9) advertising goods or services with intent not to sell them as advertised;

* * *

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

* * *

STATEMENT OF THE CASE

This is a suit brought by a number of airlines to prevent state attorneys general from fulfilling their statutorily-imposed mandate to protect their citizens from deceptive advertising. It arises from the efforts of the Attorney General of Texas and the attorneys general of other states to enforce their state false advertising laws.

1. Facts of the case.

In late 1988, the Attorney General of Texas, on behalf of Texas and four other states (California, Massachusetts, New York, and Washington), wrote letters to respondents Trans World Airlines, Inc. ("TWA"); Continental Airlines, Inc. ("Continental"); British Airways PLC ("British Airways"); Pan American World Airways, Inc. ("Pan Am"); and Lufthansa German Airlines ("Lufthansa"), advising them that their advertisements for low fare tickets were deceptive and violated the laws of the five states, as well as federal law. *See, e.g.*, J.A. at 60a.

These letters did not represent the first contact between the airlines and the State of Texas. For example, in 1987, the Texas Attorney General wrote to several airlines, including TWA and Continental, asking that they cease excluding a fuel surcharge from their advertised fares. *See, e.g.*, J.A. at 149a.

Even prior to those letters, Texas and other states had put the airlines on notice as to what were considered deceptive advertising practices, through adoption of guidelines on air fare advertising by the National Association of Attorneys General ("NAAG"). The Attorney General of Texas and the attorneys general of a number of other states served

on a task force that met with the airlines and other interested parties. The result of these meetings was the REPORT AND RECOMMENDATIONS OF THE NAAG TASK FORCE ON THE AIR TRAVEL INDUSTRY, 53 Antitrust & Trade Reg. Rep (BNA) No. 1345, Special Supplement (December 17, 1987) ("NAAG REPORT"). The main portion of the NAAG REPORT was devoted to Guidelines and Commentary relating to air fare advertising.[4]

The Guidelines and Commentary were explicitly not intended to be new law or regulation, but "merely explain in detail how existing state laws apply to air fare advertising . . .." U.S. Brief App. 11a. In adopting them, NAAG was clear that they were general enforcement policies only, and were subject to individual prosecutorial discretion and variations in individual state and common law. U.S. Brief App. 7a.[5]

Rather than avail themselves of the repeated opportunities to avoid litigation by advertising hon-

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4 The Guidelines and Commentary from the NAAG REPORT are attached to the Brief of the United States, at Appendix 9a-41a ("U.S. Brief App.").

5 An excellent summary of the development of the NAAG Guidelines can be found in *New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162, 168 (S.D.N.Y. 1990). It must be stressed that the Guidelines are no more than that—guidelines that were intended to put the airlines on notice as to what practices violated state law, so that they could bring themselves into conformity with state law and thus avoid needless litigation. NAAG REPORT at S-2.

estly, in compliance with both state and federal law, the respondent airlines chose to initiate this litigation.

2. History of the litigation. On January 23, 1989, TWA, Continental, and British Airways commenced this action in the United States District Court for the Western District of Texas, Austin Division, in which the Texas Attorney General was the only named defendant. This action sought both preliminary and permanent relief prohibiting the Texas Attorney General and unspecified others from enforcing the Texas Deceptive Trade Practices Act, or any other (also unspecified) state law, against airline advertising, an injunction that would effectively insulate these airlines from prosecution by the State of Texas for false or deceptive advertising.

On January 30, 1989, the district court granted the airlines a preliminary injunction that enjoined the Texas Attorney General and all other persons acting in concert or participation with him, *and* "all other persons having actual knowledge of" the injunction, from:

> [I]nitiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq. or any other provision of state law, which would seek *to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising* or the [*sic*] operations involving their rates, routes and/or services.

App. to Cert. Pet. 50a [emphasis added].

On April 26, 1989, the district court permitted 10 additional airlines to intervene and expanded the preliminary injunction to include 33 more attorneys general within its scope. App. to Cert. Pet. 52a. In ef-

fect, this order applied to all state attorneys general who had expressed a desire to enforce their state laws, even though most of them had taken no enforcement action whatsoever at the time the suit was filed or when the injunction was expanded to cover them.

On appeal, the court of appeals affirmed every action of the district court, holding that the district court's sweeping preliminary injunction was proper because "§1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising." App. to Cert. Pet. 34a.[6]

The preliminary injunction was converted by the district court into a permanent injunction, on June 1, 1990. App. to Cert. Pet. 8a. The relevant provisions of the permanent injunction, and the basis therefor (federal pre-emption of state consumer protection laws), are the same as those in the preliminary injunction.

On January 18, 1991, the Fifth Circuit affirmed the issuance of the permanent injunction, based on its determination that its prior opinion on the merits of the preliminary injunction was the law of the case. App. to Cert. Pet. 1a. The Court granted this petition for certiorari on November 27, 1991.

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6 The Court denied Texas' initial petition for writ of certiorari with respect to the Fifth Circuit's opinion upholding the preliminary injunction, on October 15, 1990, Justice Blackmun noting that he would have dismissed the petition as moot. 111 S.Ct. 308 (1990).

SUMMARY OF ARGUMENT

Introduction. This case again raises the question of the continued vitality of our federalist system of government—the interplay between national authority and the rights of the states to enact and enforce their own laws. There is significant confusion in lower federal and state courts as to the meaning of the pre-emption clause of the Federal Aviation Act ("FAA"), 49 U.S.C. § 1305(a)(1). The State of Texas, unsurprisingly, urges the Court to rule that it is free to enforce its consumer protection laws[7] to stop deceptive advertising by airlines. The airlines that chose to bring this action, equally unsurprisingly, want the Court to rule that they are free to operate without having to bother with complying with these state laws. The Court must now determine which of these two irreconcilable viewpoints best meets the demands of public policy, both as expressed by Congress in the FAA and as established by the policies of federalism, through the Constitution and the prior decisions of the Court.

1. Application of state consumer protection laws to airlines fosters competition. The Texas law at issue is the Texas Deceptive Trade Practices–Consumer Protection Act, TEX. BUS. & COM. CODE §§ 17.41 *et seq.*

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7 The specific Texas law at issue is the Deceptive Trade Practices–Consumer Protection Act, TEX. BUS. & COM. CODE § 17.41 *et seq.* In brief, the Texas law prohibits all false, misleading, and deceptive acts and practices in the conduct of trade and commerce. It is similar in effect to laws in other states. For a good overview of the various state laws, *see* D. PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3.01 *et seq.* For clarity, all such state laws will be referred to herein as "consumer protection" laws.

That consumer protection law, just as the other state consumer protection laws invalidated by the courts below, is one of general applicability to all commercial practices, and does not have any special connection or reference to airline rates, routes, or services, or to any other airline practice. The law serves to keep competition honest and functioning properly.

2. **Congress intended only limited deregulation of airline practices through the FAA.** The Airline Deregulation Act of 1978, PUB. L. NO. 95-504, §4, 92 STAT. 1705 (1978), removed many of the anti-competitive economic regulations that had been installed to nurture the early development of the air travel industry. Congress intended to take the federal government out of the business of the economic, utility-like regulation of the rates, routes, and services of carriers providing air transportation and, at the same time, intended to see that states did not merely step in, and by re-regulating, undo what Congress had just done. However, Congress did not choose to take the federal government out of its role in regulating deceptive practices by airlines, a role it had long shared with the states.

3. **Legislative history of the enactment of the pre-emption clause confirms that Congress did not intend to pre-empt state consumer protection laws.** Examination of the legislative history of the Airline Deregulation Act of 1978 confirms that all Congress intended, when it adopted the limited pre-emption section of the Act, was to prevent the states from nullifying Congress' intent to permit free market competition within the air travel industry.

4. **Texas law and federal law relating to deceptive airline practices are complementary and square with the principles of federalism.** The effect of the Texas law is the same as that of the FAA's anti-deception standard, and is on all fours with existing federal regulation. Congress never intended to preempt all state consumer protection efforts relating to airlines. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

5. **Except for this case, court interpretations of FAA pre-emption of state regulation of deceptive airline practices are consistent in opposing pre-emption.** This case is the only case in the federal or state courts that has found broad pre-emption of a state's enforcement of its consumer protection laws with respect to deceptive practices by airlines.

6. **ERISA is not a proper analogue.** The courts below applied a near-ritualistic use of similar language in the Employee Retirement Income Security Act of 1974 ("ERISA") to divine the intent of Congress in the FAA. However, ERISA is a statute whose pre-emptive effect is virtually unique and which serves poorly as a template for construing the FAA.

ARGUMENT

1. Application of state consumer protection laws to airlines fosters competition.

State regulation of air fare advertising plays an essential role in ensuring efficient functioning of the marketplace. It makes the marketplace function better by making it function honestly. This benefits the consumer, who gets the information needed to make a proper purchasing decision, and it rewards the honest airline, which does not lose sales to the dishonest one.

The state laws at issue are general consumer protection laws enacted by state legislatures to prevent deceptive and misleading commercial practices directed at their citizens. None of them is directed at airline practices in particular. For example, the Texas consumer protection law provides:

> False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . .. [T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to . . . advertising goods or services with intent not to sell them as advertised . . . [or] making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions . . ..

TEX. BUS. & COM. CODE §§ 17.46(a), 17.46(b)(9), and 17.46(b)(11).

This law applies to used car dealers, pyramid schemers, and snake oil sellers. It also applies to other forms of travel with which the airlines directly compete–trains, buses, rental cars–and to others in the travel industry–travel agents, hotels, motels. The law has no connection with or reference to airlines and functions irrespective of the existence of the FAA and the presence or absence of federal regulation. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990).

Public policy weighs heavily in favor of the continued ability of the State to regulate deceptive advertising aimed at its citizens. If the logic of the courts below is extended, it pre-empts all state laws that can be argued to "relate to" airline operations—and not just directly to rates, routes, and services—and the effect of this would be absurd. State laws that prohibit

gambling, prostitution, or the sale of illegal drugs could be avoided merely by the inception of those activities by an airline. This is not what Congress intended. Nor is the less-severe but nonetheless significant grant of immunity from state consumer protection laws given the airlines by the courts below.

2. Congress intended only limited deregulation of airline practices through the FAA.

The genesis of the limited pre-emption of state regulation of airline practices was the enactment of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, §4, 92 STAT. 1705 (1978), which removed many of the anti-competitive economic regulations that had been installed to nurture the early development of the air travel industry.

The primary features of deregulation were the liberalization of restrictions on entry into the industry and significant reductions in the federal government's authority to regulate rates, routes, and services of air transportation. *See generally*, Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747, 754 (1979).[8] The primary motivation for eliminating such direct economic regulation of the industry was the belief that the air travel industry could more effectively be governed by market forces than by the federal government. *Id.*

The Airline Deregulation Act amended the FAA in many ways designed to effect Congress's intent to limit direct economic regulation of the air travel industry. Of specific relevance to this case are two sec-

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8 Mr. Freeman was a Senior Attorney in the Office of the General Counsel of the CAB at the time he wrote this article.

tions, the pre-emption clause and the saving clause, which must be read together.

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. § 1305(a)(1) [in pertinent part].

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506.

It is clear that Congress intended to deregulate all federal and state economic regulation that it viewed as anti-competitive. Congress' purpose was to encourage competition among the airlines by taking the federal government out of the business of utility-type economic regulation of air transportation (setting rates, routes, and services). Prior to 1978, the federal government had strictly dictated the rates, routes, and services an airline could offer. By terminating this control, Congress hoped to encourage competition among airlines and bring ticket prices down. 49 U.S.C. § 1302(a)(3) and 1302(a)(4); Act of Oct. 24, 1978, Pub. L. 95-504, 1978 U.S.C.C.A.N. (1709 Stat.) 3737, 3773. "The purpose of deregulation was to allow competition and the marketplace to determine rates and practices in the air

transport industry." *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Great Western Airlines, Inc.*, 767 F.2d 425, 427 (8th Cir. 1985); *see* 49 U.S.C. §1302(a)(4).[9]

Congress made sure that no other governmental entity stepped into the breach to defeat the purposes of that deregulation, by adopting the pre-emption clause, to pre-empt state regulation "relating to rates, routes, or services" of airlines. *See* 123 CONG. REC. 30595 (Sept. 23, 1977); Act of Oct. 24 1978, Pub. L. 95-504, 1978 U.S.C.C.A.N. (1709 Stat.) 3737, 3740; and 49 U.S.C. § 1302(a)(5).

The fundamental issue before the Court is whether Congress indeed only intended to keep the states from beginning the same sort of anti-competitive rate regulation that Congress had deregulated at the federal level, or whether Congress intended to make all regulation of airline practices a federal matter. The airline respondents, sensing a more favorable treatment at the hands of the Department of Transportation ("DOT"), would have the Court go far beyond merely eliminating restraints on competition. The State urges that principles of federalism require a more conservative approach, preserving the deregulation Congress intended without the unintended result of preventing the very policing of the marketplace that can make competition work.

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9 For this reason, at the same time it deregulated rates, routes, and services, Congress also took away from the airlines the protection they had previously enjoyed from the requirements of antitrust laws prohibiting price-fixing. *See* 49 U.S.C. § 1551(a)(2)(A).

At least one court has concluded that Congress intended to pre-empt states from regulating only those rates, routes, and services that were part of tariffs registered with the federal government under federal law. *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1310 n. 8 (9th Cir. 1981). This conclusion is in keeping with Congress' intent to deregulate only that economic activity which had previously been fully regulated.

One aspect of a determination of pre-emption of state law is the question whether a state-law-based cause of action has been supplanted by a private federal cause of action. The Court has said that the anti-deception section of the FAA, 49 U.S.C. § 1384, does not provide for a private cause of action. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). The absence of any means for the State or its citizens to vindicate the wrong of deceptive advertising militates even more strongly against pre-emption.[10]

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10 It is also worth noting that TWA does not apparently feel itself bound by the broad preemptive scope it advances here. In *Transworld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676 (9th Cir. 1990), TWA sued a ticket broker to stop its sale of TWA's frequent flyer tickets, alleging state-law-based claims of fraud and interference with business relations. *Id.*, at 689-693. It is hard to imagine a fact situation that so directly relates to rates as TWA's attempt here to prevent a broker from selling TWA tickets for cheaper than TWA chooses to sell them, and yet TWA did not hesitate to base its lawsuit there on state law claims.

3. Legislative history of the enactment of the pre-emption clause confirms that Congress did not intend to pre-empt state consumer protection laws.

Prior to enactment of the Airline Deregulation Act of 1978, there was no express pre-emption provision in the Federal Aviation Act. By adding 49 U.S.C. § 1305(a)(1), Congress sought to protect federal deregulation from state reregulation. In the section-by-section analysis of a precursor to the Airline Deregulation Act of 1978, the House Managers of the Bill stated:

> [W]ith the passage of legislation . . . loosening Federal regulation of airline services and fares, it is possible that some States will enact their own regulatory legislation, imposing utility type regulation on interstate airline service and fares. The Act includes a specific statutory provision precluding State interference with interstate service and fares.

123 CONG. REC. 30595 (1977).

Congress further expressed its concern that inconsistent state and federal economic regulation would result in "situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State." H.R. Rep. No. 95-1211, 95th Cong., 2d. Sess., *reprinted in* 1978 U.S.C.C.A.N. 3737, 3751-3752. There are no references to pre-emption in either the Congressional Record or elsewhere in the various committee reports relating to the ADA that suggest that Congress

intended to pre-empt anything more than utility-type regulation.

Based on the legislative history, it is clear that Congress sought to protect the newly-deregulated airlines from state regulation that would interfere with the goals of economic deregulation of the air travel industry. It is impossible, however, to conclude that Congress intended to pre-empt state regulation of deceptive advertising.[11]

The saving clause was retained by Congress when it enacted the pre-emption clause. The Fifth Circuit placed full emphasis on the pre-emption clause and all but ignored the saving clause, on the

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11 In its attempt to divine Congressional intent, the court of appeals placed some reliance on subsequent legislative history. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 777-778 (5th Cir. 1990), App. to Cert. Pet. at 20a-22a. This subsequent history related to the sunset of the CAB and transfer of some of its functions to DOT. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984). Although the Sunset Act did not make material changes to either the preemption clause or the saving clause, the court of appeals nonetheless cited the House committee report's statement that "federal regulation insures a uniform system of regulation and preempts regulation by the states." *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 778 (5th Cir. 1990), App. to Cert. Pet. at 21a. The State believes that a better approach is that taken by the Fifth Circuit in *Rogers v. Frito-Lay, Inc.* 611 F.2d 1074, 1080 (5th Cir. 1980), *cert. denied* 449 U.S. 889 (1981), when it observed:

> The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history. . . . What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.

apparent theory that the pre-emption clause was enacted more recently in time than the saving clause and therefore controlled. *See* App. to Cert. Pet. at 31a. For that reason, that court flatly ignored the Court's discussion of the effect of the saving clause in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). App. to Cert. Pet. at 31a. Admittedly, *Nader* was decided before Congress passed the Airline Deregulation Act of 1978, so the Court did not have before it the interplay between the two clauses, and the saving clause cannot be read to save the precise pre-emption that Congress enacted. But Congress' retention of the saving clause (as well as Section 411, the anti-deception clause) when it added the pre-emption clause must be given some meaning. The State believes that a fair conclusion is that Congress indeed only intended limited pre-emption of economic regulation and did not intend to take away from the states the concurrent anti-deception jurisdiction they had long enjoyed. The only reason to reject this logic is if the language of the FAA forces a conclusion that Congress intended to pre-empt the states from regulating deceptive advertising by airlines. It does not.

4. Texas law and federal law relating to deceptive airline practices are complementary and square with the principles of federalism.

The Texas law is congruent with federal law relating to airline practices. State enforcement of consumer protection laws as an aspect of state police powers has a long history. *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Friedman v. Rogers*, 440 U.S. 1 (1979). Consider, for example, the long history of joint and successful enforcement of state consumer protection laws and of Section 5 of the Federal Trade Commission Act, 15

U.S.C. § 45(a)(1). Section 5, by itself, does not preempt a state's authority to enforce its own law. *See American Financial Services v. F.T.C.*, 767 F.2d 957, 989 (D.C. Cir. 1985); *Katherine Gibbs School (Inc.) v. F.T.C.*, 612 F.2d 658, 667 (2d Cir. 1979); *Double-Eagle Lubricants, Inc. v. State of Texas*, 248 F. Supp. 515, 517 (N.D. Tex. 1965). In fact, the Federal Trade Commission encouraged development of state consumer protection laws because problems in the marketplace are beyond the enforcement capabilities of the federal government. D. PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3.02[1].

The FAA has a prohibition against deceptive practices by airlines that is parallel to Texas law:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine *whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices* or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

49 U.S.C. § 1381(a) [emphasis added]. This section derives from Section 5 of the Federal Trade Commission Act, *Pan American World Airways, Inc. v. U.S.*, 371 U.S. 296, 303 (1963), and thus federal regu-

latory actions under this section should be construed according to the same federalist principles. It makes both good sense and good law.

This approach is confirmed by the one case of the Court to construe the FAA's anti-deception language. The Court held that Congress did not intend exclusive federal regulation of deceptive airline practices. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 301 (1976). The Court concluded that Congress, in providing for federal regulation of unfair or deceptive practices, did not intend to immunize airlines from liability under state law.

> In sum, § 411 confers upon the [Civil Aeronautics] Board [now, the Department of Transportation] a new and powerful weapon against unfair and deceptive practices that injure the public. But it does not represent the only, or the best, response to all challenged carrier actions that result in private wrongs.

Nader v. Allegheny Airlines, Inc., 426 U.S. at 303.

In reaching this conclusion, the Court relied in particular on the FAA's saving clause, 49 U.S.C. § 1506. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 300. The saving clause provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506. The Court concluded that the FAA and a common-law-based private action for damages for overbooking were not "absolutely inconsistent" and could coexist. 426 U.S. at 300.

State consumer protection laws are fully consistent with the FAA's parallel provisions. When the Civil Aeronautics Board ("CAB") promulgated a regulation to implement the FAA's pre-emption clause, it did not prohibit state regulation of deceptive advertising. 14 C.F.R. § 399.110.

The CAB's analysis of its regulation indicates its conclusion that deceptive advertising regulation is not the type of regulation that Congress intended to pre-empt. In the comments accompanying its pre-emption regulation, the CAB discussed at length the kinds of state regulation pre-empted by the pre-emption clause. The CAB first stated that the states were clearly prohibited from directly regulating rates, routes and services. Statements of General Policy, Implementation of Preemption Provisions of the Airline Deregulation Act of 1978, 44 Fed. Reg. 9948, 9951 (1979). The CAB concluded that pre-emption extends to all of the economic factors that go into the *quid pro quo* for the passenger's fare. *Id*. The CAB also concluded that the scope of pre-emption extended beyond direct regulation of rates, routes and services to subjects such as regulation of capital structure, minimum insurance requirements, and bonding. Its rationale for including such regulations within the scope of pre-emption was that such regulations involved the balancing of various regulatory goals against the goal of free competition and that Congress had already decided to strike such balances in favor of competition. *Id*.

Application of the CAB's rationale to state regulation of deceptive airline advertising shows that state consumer protection laws do not fall within the

scope of pre-empted regulation.[12] State consumer protection laws such as the Texas statute at issue do not advance consumer protection at the expense of market-competition. Instead, they protect consumers by protecting the competitive functioning of the marketplace.

In fact, the current DOT regulation that applies to advertising of the type at issue herein is identical to the enforcement provision taken by Texas. The existing federal regulation provides:

> The [Civil Aeronautics Board, now DOT] considers any advertising or solicitation by a direct air carrier, indirect air carrier, or an agent of either, for passenger air transportation, a tour (*i.e.*, a combination of air transportation and ground accommodations), or a tour component (*e.g.*, a hotel stay) that states a price for such air transportation, tour, or tour component to be an unfair or deceptive practice, unless *the price stated is the entire price to be paid* by the customer to the air carrier, or agent for such air transportation, tour, or tour component.

14 C.F.R. § 399.84 [emphasis added].

The letters to the airlines that served as the airlines' pretext for initiating this action advised the air-

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12 Later, in 1984, the CAB expressed its opinion that the states are not preempted from regulating advertising. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIR OF THE OVERSIGHT SUBCOMMITTEE OF THE HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, GAO/RCED-84-154 (1984), Appendix I, page 7. (It should be noted that, according to this report, DOT stated that it believed that state regulation of deceptive airline practices was preempted.)

lines that their actions violated state law as well as federal law, and gave them the opportunity to cure their violations without being sued, although an opportunity to cure is not required by state law.

The type of deceptive advertising practices that resulted in the letters from Texas and the other states is exemplified by an advertisement placed by TWA, J.A. at 198a. The TWA advertisement, which was the subject of separate litigation between TWA and the State of New York, advertises "unbelievably low fares to London, or elsewhere in Europe," offering a roundtrip air ticket *and* hotel *and* rental car for only $298. J.A. at 199a. The $298 fares are not just "unbelievably low"—they are in fact nonexistent. The actual cost of the ticket itself is $321, after the surcharges hidden in the fine print at the bottom of the advertisement are added in. J.A. at 200a. The hotel segment actually requires that the consumer first *pay for three nights in a London hotel*, after which the consumer receives three nights *outside of London*. J.A. at 199a. The rental car, for a minimum seven-day stay, was at no additional charge for only three days, after which the consumer was required to pay a minimum of $17 per day, plus more surcharges and taxes. J.A. at 200a-201a.[13]

The exact nature of these hidden surcharges is telling, as well. Of the total amount of surcharges, more than half ($13) derived from federally-imposed taxes and fees, J.A. at 200a-201a, but an additional $10 is a so-called "security surcharge" that is no more than an increased cost of doing business, which the

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13 For a detailed description of the facts surrounding this TWA advertisement, *see New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162, 167 (S.D.N.Y. 1990).

airlines chose to factor out of the actual fare. *See* Affidavit of John M. Bloodworth, Vice President of Advertising and Marketing for Pan Am, J.A. at 179a-180a. There is no rationale for the exclusion of this amount from the full fare, except to keep the fare artificially low.

Therefore, the states wrote to the airlines. For example, the November 14, 1988, letter to Pan Am reads, in pertinent part:

> It is the position of the states [of California, Massachusetts, New York, Texas, and Washington] that any fuel, tax or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.
>
> Specific surcharges which must be included in the advertised fare are
>
> - the $3.00 international departure fee,
> - the $10.00 customs fee,
> - the "security" surcharge (usually $10.00), and
> - any fuel surcharge.
>
> It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

> The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler—no footnote is required and there is therefore less "clutter" in the advertisement.
>
> More importantly, our citizens—and your customers—will not be deceived by this information.

J.A. at 185a-186a.

That letter also discussed the existing federal regulation, 14 C.F.R. § 399.84, and the fact that its requirements were parallel to the requirements of state law. J.A. at 186a-187a. The letter to Pan Am, and similar ones to TWA, Continental, British Airways, and Lufthansa (no state ever contacted the other carriers that intervened in this action), went on to discuss the interplay between DOT activity and state activity, as well as the states' position that they were not pre-empted from stopping deceptive advertising. J.A. at 187a. Rather than take advantage of the informal resolution offered by this letter, the airlines chose to initiate this litigation.[14]

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14 And they are still at it. Attached to this Brief as an Appendix is a copy of a recent advertisement for TWA that appeared in *The New Yorker* (December 16, 1991). The advertised fare is $416 from New York to Israel. In fact, the fare is $875—the $416 is one-way only (but a round-trip purchase is required), and TWA continues to delete from the advertised fare a number of surcharges, this time totalling $43 (significantly above the $23 TWA was excluding from the fare when it filed this action in 1988), from the advertised fare.

One of the issues raised in those letters was the apparent attempt by DOT to circumvent the existing federal regulation relating to surcharges, an attempt that was ultimately unsuccessful. DOT has consistently sided with the airline respondents in opposing state regulation of airline advertising and by permitting the exact practices which the state would prohibit. J.A. at 127a.

In *Alaska v. U.S. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), the court held that DOT had acted unlawfully in adopting orders that were designed to circumvent the existing regulation, 14 C.F.R. § 399.84, without actually amending it. The court recognized that the existing regulation prohibited separate listing of surcharges. *Id.* at 444. Because DOT's orders, which would have made formal DOT's policy not to enforce the existing regulation, were not adopted in keeping with the notice-and-comment procedures required by the Administrative Procedure Act, the court invalidated them, leaving the regulation as the existing federal law on the matter. *Id.* at 441.[15]

Thus, Texas law and federal law and regulation remain in twain. The mere fact that Texas may impose liability over and above federal law is no basis for a court to find pre-emption. *English v. General Electric* Co., 110 S.Ct. 2270, 2280 (1990) (*quoting California v. ARC America Corp.*, 109 S.Ct. 1661, 1667

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15 After losing in this effort, DOT republished a formal Notice of Proposed Rulemaking that would amend Section 399.84 to permit, *inter alia*, excluding certain surcharges from the advertised fare. 54 Fed. Reg. 31052 (July 26, 1989). As of late 1991, no final action had been taken on this proposed rule, nor had DOT set a date for such final action. 56 Fed. Reg. 53614 (October 21, 1991).

(1989)). Nor is the fact that compliance with state consumer protection laws might seem a burden to an airline that desires to compete unfettered by rules of conduct. *See Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990).

5. Except for this case, court interpretations of FAA pre-emption of state regulation of deceptive airline practices are consistent in opposing pre-emption.

Court constructions of the pre-emptive effect of the FAA, as applied to a variety of practices and state laws, vary widely depending on the facts of the case and the state laws involved. However, with respect to state consumer protection laws, such as the Texas law involved here, there is an island of agreement in an otherwise turbulent sea of dispute.

In *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1991), *petition for cert. filed*, No. 91-505, the Ninth Circuit held that Section 105 of the Federal Aviation Act pre-empts claims based on state law ". . . only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted." 923 F.2d at 660 [emphasis in original].

The Ninth Circuit does not discuss the Fifth Circuit's opinion in this case. It does, however, cite *New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162 (S.D.N.Y. 1990). The district court there was aware of the district court's holding in this case and did not follow it. *Id.*; 728 F.Supp. at 166-167. The court drew a distinction between regulation of rates, routes, and services, and regulation of deceptive advertising.

> [A]ny relationship between New York's enforcement of its laws against deceptive advertising and Pan Am's rates, routes, and services is remote and indirect. In challenging Pan Am's advertising, New York does not care how much Pan Am charges, where it flies, or what amenities it provides its passengers. Its sole concern is with the manner in which Pan Am advertises those matters to New York consumers. Thus, as far as New York is concerned, Pan Am is free to charge $200 or $2000 for a flight from LaGuardia to London, but it cannot take out a full-page newspaper advertisement telling consumers the fare is $200 if it is in fact $2000. Similarly, Pan Am remains free to route a plane from Ithaca to Istanbul with as many stops in between as it chooses, but it cannot market that flight to New York consumers as a "direct" flight.

New York ex rel. Abrams v. Trans World Airlines, Inc., 728 F.Supp. 162, 176 (S.D.N.Y. 1990).[16] The dis-

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16 This opinion involved three cases: New York's separate suits against TWA and Pan Am for deceptive advertising (initially filed in New York State court, and removed to federal court by TWA and Pan Am) and Pan Am's suit against New York (initially filed in federal court). The district court remanded to state court New York's suits against TWA and Pan Am and dismissed most of Pan Am's affirmative claims in the original action. Pan Am subsequently dismissed that action and the state court denied New York the relief it sought, finding that New York was collaterally estopped from relitigating the issue whether the advertisements were deceptive because of the Fifth Circuit's decision that such actions were preempted by federal

trict court has perfectly summarized the approach to regulation taken by the State of Texas in this case. Texas does not contest the right of an airline to determine its own rates, routes, and services, but only the ability of an airline to lie to Texans about what rates, routes, and services it has decided to offer.

Another federal district court took a similar approach, in a case involving a private suit under a state consumer protection law. In *Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338 (W.D. Pa. 1982), a consumer alleged that a TWA advertisement for a special non-stop Pittsburgh to London fare was deceptive and misleading. *Id.* at 1347. The court held that this cause of action was not pre-empted, but preserved by the saving clause. *Id.* at 1345. Here, too, the analysis is consistent.

The only state court case relating to application of state deceptive advertising laws to airline practices reached the same conclusion. In *People v. Western Airlines, Inc.*, 155 Cal. App. 3d 597, 600, 202 Cal. Rptr. 237 (Cal. App. 1984), *appeal denied* (Cal. Sup. 1984), *cert. denied*, 469 U.S. 1132 (1985), the California court of appeals considered the effect of the pre-emption clause and concluded that state regulation of an airline's manner of advertising rates and services was not within the ambit of the pre-emption clause. *Id.*

In the only case that might appear to give some credence to the case for pre-emption of state regulation of deceptive advertising, the Seventh Circuit held that the FAA does pre-empt Illinois' consumer protection law to the extent that the law would require an "air carrier to deal with a would-be agent

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law. *New York ex rel. Abrams v. Trans World Airlines, Inc'*, 575 N.Y.S.2d 1 (App. Div. 1991).

who refuses to respect a contract restricting advertising of discount prices." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 755 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990). However, that court took care to clarify that its ruling did not touch on the "extent to which state laws may control deceptive advertising, require disclosures, or enforce (as opposed to upset) contracts between carriers and agents." *Id.* at 755. In an earlier decision of that circuit written by Judge Easterbrook, the author of the opinion in *Illinois Corporate Travel*, the court had said, in dictum, that common law remedies are available in cases of fraud by airlines, citing to *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), discussed above. *Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988). It therefore appears likely that, if the Seventh Circuit were to address the issue directly, it would rule in favor of state regulation of deceptive advertising and against pre-emption.

Although courts have been uniform in refusing to pre-empt state regulation of deceptive advertising by airlines, the same cannot be said of other types of cases involving pre-emption by the FAA.

Perhaps the most perplexing opinion is one pending before the Court, *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *petition for cert. filed*, No. 91-502. In that case, in apparent full conflict with its earlier decision in *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *petition for cert. filed*, No. 91-505, the Ninth Circuit held that the pre-emption clause prevented state regulation of the rates, routes, and services of Federal Express's intrastate trucking activities, which Federal Express chose to conduct as part of its package delivery system. *Id.* at 1078. The court dis-

tinguished *Federal Express* from *West* by saying that the former involved regulation of an integrated air-cargo system, which Congress specifically intended to encourage and protect from state regulation, but that the latter involved regulation relating to the field of contract. *Id.* at 1078-1079. This distinction does not appear to be warranted by the general rules relating to pre-emption, established by the Court and discussed above.

Other reported cases evince a similar confusion of analysis and differing results. *See, e.g., French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir. 1989); *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987); *Air Transport Ass'n of America v. Public Utilities Commission of California*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984); and *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980).

6. ERISA is not a proper analogue.

The Fifth Circuit placed great weight on the similarity of the pre-emption clause in the FAA to the pre-emption clause in the Employee Retirement Income Security Act of 1974 ("ERISA"). *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 780 (5th Cir. 1990), App. to Cert. Pet. at 25a. The prime underpinning of the limitless reading it gave the "relating to" language of the FAA is the broad reading given by the Court to similar language in ERISA. That reliance is misplaced, for ERISA is not an analogous law.

ERISA is a comprehensive statute which Congress adopted after a careful study of private retirement pension plans. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). ERISA marked the decision of Congress to enact broad-based federal regulation of pension plans. The Airline Deregulation Act of 1978, on the other hand, marked only limited deregulation of what had been a highly-regulated industry. As it relates to false advertising and consumer protection, as opposed to utility-type ratemaking, the FAA is not at all comprehensive.

Beyond that, the pre-empting provisions of ERISA "perhaps are not a model of legislative drafting." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Therefore, reference to ERISA's broadly-pre-emptive effect, based solely on the similarity of two words, ignores both the flaws of the ERISA language and its fundamental difference from the FAA.

ERISA pre-emption is not sweeping because of its "relates to" language; rather, that "relates to" lan-

guage is read broadly because of the wide and inclusive sweep of the comprehensive ERISA scheme. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990). No such sweep exists in the FAA Act, nor should the Court strain to find one.

But perhaps the best argument against a rote, word-for-word comparison of ERISA's broad pre-emption clause to the pre-emption clause of the FAA is made by a comparison of the different pre-emptive schemes of the two laws.

The scope of ERISA pre-emption is dependent on three separate sections of that law: (1) the pre-emption clause itself, 29 U.S.C. § 514(a), (2) the saving clause, 29 U.S.C. § 1144(b)(2)(A), and (3) the deemer clause, 29 U.S.C. § 1144(b)(2)(B). FAA pre-emption, on the other hand, is governed by only two sections of that law: (1) the pre-emption clause, 49 U.S.C. § 1305(a)(1), and (2) the saving clause, 49 U.S.C. § 1506. These respective clauses operate as follows:

ERISA	Federal Aviation Act
Pre-emption clause Except as provided in the saving clause, ERISA supersedes any and all State laws "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 514(a)	**Pre-emption clause** FAA pre-empts any State law "relating to rates, routes, or services of any air carrier." 49 U.S.C. § 1305(a)(1)
Saving clause Except as in the deemer, nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A)	**Saving clause** Nothing in the FAA "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506
Deemer clause No employee benefit plan "shall be deemed . . . to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." 29 U.S.C. § 1144(b)(2)(B)	**Deemer clause** [None]

The wording of the pre-emption clauses in both ERISA and the FAA is in fact similar. After that, however, the similarity ceases. The saving clause of ERISA reserves to the States only those laws that regulate insurance, banking, and securities, subject to the deemer clause. In the FAA, on the other hand, Congress reserved to the States *all remedies* provided by common law or statute. Many of the Court's decisions on ERISA pre-emption turn on the question of whether State laws indeed regulate insurance, banking, and securities and thus come within the initial scope of the saving clause. *See, e.g., FMC Corp. v. Holliday*, 111 S.Ct. 403, 409 (1990).

Furthermore, unlike ERISA, the FAA has no deemer clause to diminish the effect of its savings clause. And it is in that distinction that the greatest difference lies. What the ERISA saving clause seemingly reserved to the states, the deemer clause partially pulls back to exclusively federal regulation. For example, although an insured employee benefit plan is subject to indirect state regulation to the extent that the state regulates the insurance company, a self-funded employee benefit plan is not to be deemed as in the business of insurance and is therefore not subject to state regulation. *FMC Corp. v. Holliday*, 111 S.Ct. 403, 409 (1990).

The FAA does not in any way similarly diminish its own saving clause. The Fifth Circuit failed to include the proper effect of the saving clause in its construction of the pre-emption clause.

As a simple matter of reading the statutes, it is clear that ERISA is not a fit model for construing the pre-emptive effect of the FAA.

CONCLUSION

For the reasons stated, the judgments of the courts below should be reversed.

Respectfully submitted,

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APPENDIX

TWA Advertisement

The New Yorker

December 16, 1991

Advertising Insert, unpaginated

[Reduced 70% from original. Full text printed following reproduction of advertisement.]

FLY TO ISRAEL ON TWA AND SAVE MORE THAN FOND MEMORIES.

$416
Each way based on roundtrip purchase. Service from JFK Int'l.

Save on your airfare. Save on your hotel accommodations. Save on your car rentals. Savings you can only get with a TWA roundtrip ticket to Israel.

TWA makes it convenient to visit Israel with direct service to Tel Aviv. You'll arrive rested and ready to visit the Western Wall of Jerusalem's Old City, the Walls of Jericho. Eager to explore the marine wonders beneath the Red Sea, historical Masada and all the pleasures Israel has to offer.

GREAT SAVINGS ON DELUXE MORIAH HOTEL ACCOMMODATIONS.

Stay at the deluxe and centrally located Moriah Jerusalem, the Moriah Plaza Tel Aviv, or the Moriah Plaza Tiberias for 8 nights (using at least 2 of the 3 hotels), and you'll receive this low rate now thru February 29, 1992. Just call Moriah Hotels at *1-800-221-0203* or, in New York, *212-541-5009* and be sure to ask for the TWA/Moriah Hotels Great Savings Program.

DELIGHTFUL SAVINGS ON EXCLUSIVE TWA/ELDAN CAR RENTALS.

Drive to Tel Aviv or Jerusalem on Israel's super highway, enjoy a leisurely trip to the famous resort of Elat, stopping at your leisure along the coast — Eldan, Israel's largest car rental company, offers you exclusive low prices when you fly roundtrip on TWA.

With a branch conveniently located at Israel's Ben-Gurion International Airport, and thirteen additional offices around the country, Eldan has just the right car for your family or business needs from its fleet of 2100 vehicles. Reserve in advance in the U.S. and Canada by calling *1-800-531-8778* or, in New York, *212-629-6090*.

Historical Israel never looked better. TWA's low fares and hotel and car rental deals make this the perfect time to enjoy all the pleasures of Israel. For reservations call your Travel Agent or TWA at *1-800-892-4141*.

MORIAH HOTELS

DELUXE HOTELS
From $29.50 Per person, per night, double occupancy

CAR RENTAL
From $175.00 Per week, Unlimited Mileage

eldan RENT-A-CAR אלדן השכרת רכב

TWA
FIND OUT HOW GOOD WE REALLY ARE.

FARE CONDITIONS: Fare featured is each way based on roundtrip purchase, is non-refundable, is valid for travel effective now thru 3/31/92. Fare is higher 12/16-12/24/91. Fare is subject to change and governmental approval. Change of itinerary penalty applies. 14 day advance purchase required. Minimum stay required is 6 days, maximum stay allowed is 21 days. Seats are limited and may not be available on all flights or days of week. $28 fee for customs/immigration/agriculture, security surcharge and U.S. departure tax not included. $15 Israel departure tax not included. Passengers are to ID, International Airport. Moriah Hotels: Rate shown is per person, based on double occupancy and does not include 15% service charge. Minimum stay is 8 nights, ordering at least two of the Israel properties mentioned. Rates valid now through 2/29/92. Peak season supplement of $8 per person applies 12/20/91-1/5/92. All reservations are subject to availability. Eldan: Price excludes optional LDW and CDW (full standard drivers qualifications apply). Rates valid now thru 3/31/92 except for holiday period 12/12/91-1/5/92 when higher rate applies.

BEST AVAILABLE COPY

[Text of advertisement on preceding page.]

FLY TO ISRAEL ON TWA AND SAVE MORE THAN FOND MEMORIES.

$416
Each way based on roundtrip purchase. Service from JFK Int'l.

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